STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH F. DAVIS,

Plaintiff/Counterdefendant-Appellee,

v

FARM BUREAU LIFE INSURANCE COMPANY OF MICHIGAN, FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN, FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN and FB ANNUITY COMPANY,

Defendants/Counterplaintiffs-Appellants.

UNPUBLISHED
September 15, 2005

No. 254299
Bay Circuit Court
LC No. 01-003962-NZ

Before: Meter, P.J., and Murray and Schuette, JJ.

PER CURIAM.

Pursuant to an order of our Supreme Court remanding this case to this Court for consideration as on leave granted, defendants/counterplaintiffs ("defendants") appeal from the trial court's order denying their motion for summary disposition in this breach of contract action. We reverse.

I. FACTS

This action arises out of an agreement between plaintiff, Joseph F. Davis, and defendants, an insurance company. The agreement made plaintiff an independent contractor who was to distribute defendants' insurance products and to comply with all applicable laws. The agreement required plaintiff to "comply with the Companies' rules and regulations . . . ." The agreement gave either side the right to terminate the agreement at any time, with or without cause.

In exchange for his sales and servicing of insurance products, the agreement provided for plaintiff to receive compensation according to "schedules attached to and forming part of" the agreement. The schedule at issue here is the Agent Commission Schedule, which defendants had the right to modify. The Agent Commission Schedule provided for commissions, as well as

"extended earnings," which are the payments at issue here. Extended earnings are paid upon termination of the agent agreement.

Defendants had the right to terminate extended earnings "immediately" if the agent "violates any rule or regulation of any of the Companies, fails to comply with any of his/her obligations under the Agent Agreement, commits and/or is convicted of a criminal act against any of the Companies . . . and/or violates a Michigan Insurance Law."

On July 4, 2000, a customer of plaintiff, Thomas A. Roby, was driving his boat, when the battery went dead. Michael O'Leary of Michigan Marine Ltd. jump started the boat and charged Roby $283.50. O'Leary created an invoice stating a date of service of July 4, 2000. On July 13, 2000, a policy of insurance for Roby's boat became effective.

In October of 2000, plaintiff contacted O'Leary, claiming that he lost the invoice for the service call. Plaintiff asked O'Leary to send additional documentation for the service call. Plaintiff requested that O'Leary put a later date on the new invoice. Plaintiff did not suggest a specific date, but he did suggest a later date. Regarding why plaintiff requested a later date, O'Leary testified: "I recall he had messed up in the paperwork. It sat around so long, he misplaced it." O'Leary told plaintiff he would see what he could do. O'Leary created a new invoice and dated it September 4, 2000.

On October 25, 2000, Roby submitted a claim to defendants for a loss alleged to have occurred on September 4, 2000, based on the jump-start service provided by Michigan Marine. As proof of the claim, Roby submitted the work order with the September 4, 2000, date, and on November 1, 2000, defendant Farm Bureau General Insurance Company paid the claim.

Douglas Kane of defendants' Special Investigation Unit (SIU) conducted an investigation of the claim and contacted O'Leary to request a work order to verify the service date. In November, 2000, O'Leary provided to Kane the original invoice with the July 4, 2000, service date. Kane then knew that the actual loss occurred on July 4, 2000, prior to the July 13, 2000, effective date of Roby's policy.

On January 1, 2001, a new commission schedule became effective for plaintiff's agreement, containing the same provision allowing defendants to terminate extended earnings immediately if the agent committed one of the five types of wrongdoing. On January 3, 2001, defendants terminated the agreement with plaintiff, because of the finding from Kane's investigation of the July 4, 2000, loss described above. On February 19, 2001, defendants advised plaintiff that they were refusing to pay him any extended earnings.

In November, 2001, plaintiff filed his complaint, alleging breach of the agent agreement. In February, 2002, defendants filed their answer, affirmative defenses and counterclaim for declaratory relief. In the counterclaim, defendants brought five counts, including fraudulent insurance acts, misappropriation of premiums, mishandling of an application, and multiple rule violations.

In September of 2002, defendants filed their motion for summary disposition of plaintiff's claim under MCR 2.116(C)(10), arguing that defendants properly terminated

plaintiff's extended earnings by reason of fraudulent insurance acts and that there was no genuine issue of material fact that plaintiff violated the agent agreement.

The trial court heard oral argument on defendants' motion on November 18, 2002. The trial court denied the motion finding factual disputes regarding: (1) whether there was fraud, which the court held had to be proved by clear and convincing evidence; (2) whether there was a material breach by plaintiff; and (3) whether defendants had good cause for the termination. On December 3, 2002, the trial court entered its order denying defendants' motion, stating that there were questions of fact regarding whether the alleged breach was material, "whether plaintiff committed a fraudulent act," and "whether there was good cause for the termination of the agreement . . . ."[1]

Defendants applied for leave to appeal to this Court which was denied. *Davis v Farm Bureau Life Ins Co*, unpublished order of the Court of Appeals, entered July 10, 2003 (Docket No. 245681). Defendants applied for leave to appeal to the Supreme Court. In lieu of granting leave to appeal, the Supreme Court remanded the case to this Court for consideration as on leave granted.

II. SUMMARY DISPOSITION

On appeal, defendants argue that the trial court erred in denying their motion for summary disposition of plaintiff's claim. We agree.

A. Standard of Review

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion brought pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue on which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

B. Analysis

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[1] The court's order incorrectly refers to good cause for the termination of the agreement; it should have referred to good cause for the termination of extended earnings.

"The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties." *Zurich Ins Co v CCR & Co (On Reh)*, 226 Mich App 599, 603; 576 NW2d 392 (1997) (internal quotes and citation omitted). "If the contract language is clear and unambiguous, its meaning presents a question of law for the courts to determine." *AFSCME v City of Detroit*, __ Mich App __; __ NW2d __ (Docket No. 253592, issued July 5, 2005), slip op, p 3. The determination of whether contract language is clear and unambiguous is a question of law. *Mahnick v Bell Co*, 256 Mich App 154, 157, 159; 662 NW2d 830 (2003). The language of a contract must be given its plain and ordinary meaning. *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997). Contracts must be construed to give effect to every word or phrase as far as practicable. *Klapp v United Ins Group*, 468 Mich 459, 467; 663 NW2d 447 (internal quotes and citations omitted), on remand 259 Mich App 467 (2003). "The goal of contract construction is to determine and enforce the parties' intent based on the plain language of the contract itself." *AFSCME, supra*, slip op at 3. When contract language is clear, unambiguous and has a definite meaning, courts lack the ability to write a different contract for the parties. *Mahnick*, *supra* at 159.

Here, the parties entered into an agreement whose purposes included to distribute insurance products and to comply with all applicable laws. The agreement incorporated by reference the commission schedule. Defendants retained the right to modify the commission schedule. The commission schedule allowed defendant to terminate extended earnings immediately if plaintiff committed any of five forms of wrongdoing: (1) plaintiff "violates any rule or regulation of any of the Companies"; (2) plaintiff "fails to comply with any of his/her obligations under the Agent Agreement"; (3) plaintiff "commits . . . a criminal act against any of the Companies"; (4) "violates any regulation of the Michigan Insurance Bureau"; or (5) plaintiff "violates a Michigan Insurance Law." Although defendants exercised their right to modify the commission schedule, each new commission schedule contained the foregoing provision.

Defendants contend that plaintiff's actions in relation to a claim submitted by Thomas Roby constituted grounds for termination of extended earnings. Defendants cite the provision that prohibits plaintiff from improperly binding the company or waiving its rights:

> The Agent shall not make, alter, or discharge any contract of insurance; waive any policy provision . . . or alter, waive or forfeit any of the Companies' rights, requirements, or conditions in any policy of insurance, or otherwise obligate the Companies in any way, except . . . as otherwise authorized in writing by the Companies.

Defendants argue that plaintiff's role in helping Roby submit a falsified claim was a failure to comply with plaintiff's obligations under the agreement. We agree. According to the testimony of O'Leary , plaintiff asked O'Leary to submit a second invoice for the service provided for Roby's boat problem, and asked O'Leary to include a later date on the new invoice. O'Leary did so, providing plaintiff with a new work order dated September 4, 2000, instead of the actual date of service of July 4, 2000. Thus, the work order procured by plaintiff reflected a false date of service. The affidavit of Kanestates that coverage under Roby's policy began on July 13, 2000, and it is undisputed that the work order procured by plaintiff was dated September 4, 2000. Thus, by way of plaintiff's request to O'Leary, Roby was able to obtain coverage for a loss that would otherwise have been outside of the coverage period, thereby causing forfeiture of defendants' right to deny the claim. In so doing, plaintiff caused defendants to "forfeit . . . the

Companies' rights . . . in [a] policy of insurance," and "obligate[d] the Companies" where they would not otherwise have been obligated. Plaintiff thereby failed to comply with his obligations under the agent agreement.

Plaintiff argues that any wrongdoing did not constitute a material breach of the agreement, and that a question of fact exists regarding such materiality. This argument lacks merit. The agreement and commission schedule allowed defendants to terminate extended earnings if plaintiff failed to comply with "any" of his obligations under the agreement, and did not require a "material breach." Therefore, as long as plaintiff failed to comply with an obligation under the agreement, it is irrelevant whether he committed a material breach. Denial of summary disposition requires a genuine issue of material fact. MCR 2.116(C)(10). It is immaterial whether plaintiff committed a material breach of the agreement because the agreement allows termination of extended earnings for a failure to comply with any obligation under the agreement.[2]

Further, plaintiff cites no authority for the proposition that a party exercising a right to terminate extended compensation must, before exercising that right, prove the required predicate by clear and convincing evidence. Parties may bind themselves to whatever termination provisions they wish. *Thomas v John Deere Corp*, 205 Mich App 91, 93; 517 NW2d 265 (1994). This Court cannot create a new provision not present in the parties' bargain. *Mahnick, supra* at 159.

Reversed.

/s/ Patrick M. Meter
/s/ Christopher M. Murray
/s/ Bill Schuette

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[2] Further, even if materiality were required, defendants argue that plaintiff's wrongdoing was material to the principal-agent relationship because fidelity and honesty are key to that relationship. We agree. Plaintiff, the wrongdoer, cannot be heard to argue that his wrongdoing was not material to the principal-agent relationship because an agent owes fiduciary duties of good faith and loyalty to the principal. *Burton v Burton*, 332 Mich 326, 337; 51 NW2d 297 (1952). Aiding in the submission of a fraudulent insurance claim to one's principal must be viewed as material to the agent agreement, and because plaintiff has presented no documentary evidence to refute defendants' evidence, there is no genuine issue of material fact regarding materiality.